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No. 79-1833

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY OF PETITIONERS

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REPLY OF PETITIONERS

This reply is submitted in response to the oppositions of the Government ("Gov. opp.") and the private utilities ("Utils. opp.").

I.

The Statutory Standard of Common Carriage Is a Recurring Issue Meriting Review by This Court.

For a hundred years federal courts have held or assumed that the common-law test of common carriage—a "holding out" to carry for the public indifferently—was adopted by the

Interstate Commerce Act to define the Commission's jurisdiction over railroads. The Sixth Circuit in this case concluded, however, that the Interstate Commerce Act altered the common-law test and discarded the traditional "holding out" standard. Pet. App. 10b-11b. Following the Sixth Circuit, the Government's opposition asserts in substance that the Act did modify the common-law definition of common carriage. Gov. opp. 7-8.

The Government's position is at odds with both the language of the statute and established precedent. The Government's opposition does not deny that the Interstate Commerce Act utilized the "common carrier" language traditional at common law (see Section 1(1)) without furnishing any different definition or hinting at a change in the standard. Furthermore, this Court has previously applied the common-law holding-out standard[1] and, even more recently, stated that the Act "codified the common law obligations of railroads as common carriers."[2] And the lower courts have repeatedly applied the holding-out standard under analogous provisions of the Federal Communications Act (see Pet. 20, n. 35), while the ICC has applied the holding-out standard in its previous cases under the Interstate Commerce Act. *Id.* at 20, n. 36.[3]

The Government opposition makes little effort beyond mere assertion to support its claim that the common-law holding-out standard has been changed by the Interstate Commerce Act. Yet some defense is clearly necessary in light of the consistent precedent favoring the common-law definition and

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[1] *Washington ex rel. Stimpson Lumber Co.* v. *Kuykendall*, 275 U.S. 207, 211 (1927).

[2] *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 387, 406 (1967).

[3] Accordingly, there is—contrary to the Government's contention—a conflict between the decision below on the one hand and, on the other, prior decisions of this Court, lower federal courts, and the Commission itself which heretofore have followed the common-law standard of common carriage in construing the Act and comparable regulatory statutes. See Pet. 13, 14, 18-21.

the settled proposition that, where Congress uses familiar terms without elaboration—here "common carrier"—it must ordinarily be taken to intend their settled meaning. *E.g., Lorillard* v. *Ponds*, 434 U.S. 575, 583 (1978). The Government merely asserts that "enactment" and subsequent development of the Act has altered the common-law test (Gov. opp. 7), citing the lower court's equally unsupported view of this proposition. The only other support offered are general references to the National Transportation Policy, which has no bearing on the issue,[4] and to this Court's decision in the *American Trucking Ass'ns* case, which is in fact contrary to the Government's assertion.[5]

What is more, the position of the Government and the court below presents a major, recurring issue of statutory construction warranting review by this Court. The legal standard for determining what activities are subject to common-carrier regulation is a jurisdictional demarcation for obligations of railroads, motor carriers, water carriers, communications carriers and other carrier entities regulated under either the Interstate Commerce Act or analogous statutes modelled on it. See Pet. 24. Indeed, the Government's opposition makes no attempt to deny that the statutory standard for determining common carriage under the regulatory statutes is an important and recurring issue of a type that this Court conventionally reviews. Accordingly, plenary review should be granted.

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[4] The National Transportation Policy provides only broad assertions of purpose to guide the Commission in exercising its powers over railroad common carriage. It says nothing whatever about a standard for determining what entities or specific activities are being regulated.

[5] The *American Trucking Ass'ns* case, quoted above, actually supports the view that Congress was following the common law when it "codified the common law obligations of railroads as common carriers." 387 U.S. at 406.

II.

The Government's Attempt to Justify the Lower Court's Decision on a Ground Not Adopted by the Agency or the Lower Court Is Indefensible.

Unable to defend the lower court's contention that the Act changed the common-law standard, the Government's opposition devotes most of its discussion to asserting that the Eastern railroads' carriage of nuclear materials has been conducted on a common-carrier basis in accordance with traditional standards. This blatant effort to support the result on a new foundation, adopted neither by the Commission nor by the Court of Appeals, merely underscores the Government's uneasiness with the Sixth Circuit's holding.

It is undisputed that the common-law standard of common carriage was whether the carrier had "held itself out" as a common carrier (*The Express Cases,* 117 U.S. 1, 21 (1886)) for the particular traffic involved, "undertak[ing] to carry for all people indifferently . . . ."[6] The Eastern railroads have manifestly not held themselves out as common carriers of nuclear materials: they have carried nuclear materials under contracts principally with the Government, contracts that explicitly negated any representation of common carriage; and this service has been furnished pursuant to terms and conditions quite different from those ordinarily involved in common carriage. See Pet. 8. These individualized arrangements, typical of private carriage, are not converted into common carriage by the length of time during which private carriage has been furnished.[7]

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[6] *E.g., American Tel. & Tel. Co.* v. *FCC,* 472 F.2d 17, 24 (2d Cir.), *cert. denied,* 438 U.S. 875 (1978), and other cases cited at Pet. 20, n.35.

[7] The Government's opposition seems to assume that if private carriage is conducted over the course of many years, it magically metamorphoses into common carriage. Gov. opp. 1, 7. There is nothing in the common-law definition, the precedents, or past practice that gives the slightest support to this unspoken but critical assumption. On the contrary, private carriers have operated for decades without any suggestion that they have become common carriers.

The Government's opposition distorts the railroads' position by suggesting that the railroads claim not to be common carriers "simply because they had never filed a tariff" covering nuclear material movements. Gov. opp. 3-4. See also *id.* at 6-7. While the "carriers' self-description [or] . . . the formalism of a tariff filing" (Gov. opp. 7) may not be decisive,[8] the uncontroverted *facts* are that the Eastern railroads have carried such nuclear materials only "as a matter of accommodation or special engagement" (*Railroad Co.* v. *Lockwood,* 84 U.S. (17 Wall.) 357, 377 (1973)) pursuant to specially negotiated contracts with the Government or, occasionally, individual utilities. As this Court has made clear, the test of a carrier's status is "what it does" (*United States* v. *California,* 297 U.S. 175, 181 (1936)), and "what" the Eastern railroads have done is to provide nuclear material carriage without tariffs, only on the basis of special arrangements, and with virtual acknowledgement from the Government that common carriage was not involved.[9]

The Eastern railroads' actions with regard to nuclear materials are so antithetical to the concept of common carriage, as defined and applied at common law, that neither the Commission, nor its ALJ, nor the Sixth Circuit, even suggested that the railroads could be characterized as common carriers of such materials under the common-law standard. Instead, the

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[8] The Government overstates the case, however, in suggesting that omission of tariffs and self-description are irrelevant. The very case it cites but does not quote observed: "With respect to the claim that the Refrigerator Company did not file tariffs with the [ICC], counsel say that this is not proof that it was not a common carrier. No; but it tends to show that the Refrigerator Company did not regard itself as such." *United States* v. *ICC,* 288 F.2d 649, 654 (D.C. Cir. 1923), *aff'd,* 265 U.S. 292 (1924).

[9] The Government's position is especially unseemly in light of the contracts, signed on behalf of "the United States of America" represented by the AEC, explicitly acknowledging that [the railroads] do not hold themselves out to transport such [nuclear] materials. . . ." *E.g.,* J.A. Ex. 583.

holding of the Sixth Circuit is that the common-law standard has been discarded in favor of some new standard which the Government's opposition avows but cannot defend. Under these circumstances, the Government's attempt to rescue the result below, on grounds never adopted below and inconsistent with the known facts, provides no basis for denying certiorari.

III.

None of the Arguments Offered by the Utilities, Which Are Inconsistent With Those Offered by the Government, Provides a Basis for Sustaining the Lower Court's Decision.

The principal argument offered by the utilities opposing certiorari is different from the defense offered by the Government. The utilities contend in substance that the holding-out standard of the common law has been entirely discarded by the Act and that common-carrier status now exists wherever the Commission finds that it is "reasonable" for a carrier to provide common-carrier service. Utils. opp. 8-10. If anything, this drastic assertion underscores the need for review.

The utilities' position finds no support whatever in the statute and would virtually remove any limit to the Commission's jurisdictional reach. It would, indeed, be startling for Congress to make the jurisdictional *outer* boundary of the statute depend on what the agency thought it was reasonable to regulate, and such an argument would raise the most serious constitutional questions of improper delegation of authority. See *Industrial Union Dep't* v. *American Petroleum Institute*, 48 U.S.L.W. 5022, 5032 (U.S., July 2, 1980). In all events, nothing in the statute, its history or past precedent, lends any support for this view.

The statute enacted by Congress provided that its provisions applied to railroads acting as "common carriers" (Section 1(1)) and for almost a hundred years no one has dreamed of

suggesting that provisions of the Act applied to railroads when acting as private carriers. The utilities apparently attribute to Congress a secret intent in 1978, during a routine codification and without any public notice or discussion, to extend the provisions of the Act to *all* railroad transportation and then to carve out *sub silentio* an exception for situations in which the Commission found that it was not "reasonable" to apply common-carrier obligations. Utils. opp. 8. Since Congress explicitly disavowed any intent to change the statute,[10] it is not surprising that neither the Sixth Circuit nor the Government endorses so extraordinary a reading of the statute.

The utilities are equally mistaken in suggesting (Utils. opp. 8-9) that this Court has resolved in their favor the issues presented in this case. *Kansas C. S. Ry.* v. *United States*, 282 U.S. 760 (1931), sustained a determination that railroads—which have long transported railroad passenger cars under tariff—are common carriers of railroad passenger cars and cannot transport passenger cars of other railroads without tariffs.[11] *Director General* v. *Viscose*, 254 U.S. 498 (1921), also cited, concerned an attempt to *de*-tariff silk long carried by the railroads on a common-carrier basis. Neither case in any way supports the decision below involving a class of commodities that the Eastern railroads have *never* transported on a common-carrier basis.

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[10] The utilities' reading is directly inconsistent with Congress' directive in the 1978 codification that the revision "may not" be construed as making substantive changes in the law replaced. 92 Stat. 1468.

[11] The *Kansas City* case would be analogous only if the Eastern railroads had long carried nuclear materials for electric utilities under tariff but declined to file tariffs to transport the same materials for manufacturers. The undisputed fact is that, prior to this case, the Eastern railroads did not carry nuclear materials under tariff for anyone.

Finally, it is claimed that rail transportation of nuclear materials is desirable and safe. Utils. opp. 3-5. The railroads have transported such materials on a private carriage basis for a number of years under contracts providing extensive special precautions for this dangerous commodity; and they have not threatened to discontinue such carriage. So far as the decision below affects the continuance of this transportation, it does so only by making it more difficult for the railroads to maintain those special safety precautions long incorporated in the private contracts but deemed unwarranted by the Commission for tariffed transportation.[12]

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[12] These precautions include the use of special trains dedicated solely to such dangerous nuclear or radioactive material, special routing around yards or specially congested or dangerous areas, low speed limits, and other restrictions. Pet. 8. It is the Commission's position that such precautions are unnecessary (see Gov. opp. 2), and it has asserted common-carrier jurisdiction over the Eastern railroads to implement that determination.

CONCLUSION

For the reasons stated above and in the petition, certiorari should be granted.

Respectfully submitted,

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